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Held, that a valid trust had been created for the separate use of the wife, and upon a bill filed by her after his death she was declared entitled to the 2700*l.*, out of his estate, with interest from the day of his decease. STUART, V.-C., said that there was a most essential difference between the case of a man who declares that he will hold property in trust for another, and that of one who only affects to give, but did nothing to complete his gift. He was surprised to find it laid down that if there was a declaration of trust, with notice to the trustee, the question whether the latter acted upon such notice or not made a difference as to the validity of the declaration of trust. It was always his understanding that wherever property was once impressed with a trust, the right of the *cestui que trust* was wholly independent of the conduct of his trustee; that the recognition of the trust by the latter, on the one hand, or his refusal to execute it, on the other, could not affect the interest of the person beneficially entitled. If the trusts were once impressed, it could not affect the right of the *cestui que trust* that the trustee had applied the trust property to his own use or otherwise committed a breach of trust.

A. SYDNEY BIDDLE.

(*To be continued.*)

RECENT AMERICAN DECISIONS.

Supreme Court of New Jersey.

JOHN HIRES v. WILLIAM HURFF.

The property in a chattel passes according to the intention of the parties. That is a question of fact for the jury, unless it is plain by admitted facts, that the law will justify a finding but one way.

Where there is a contract for the sale of a smaller quantity of goods from a greater mass of like quality (corn), which remains in the possession of the seller, without selection or appropriation, the contract is executory, and the property does not pass, unless there be a clearly expressed intention to make the sale complete without further action by the parties.

ON error to Gloucester Circuit Court. This was an action of trover, brought by the sheriff of Salem county, John Hires, to recover the value of two hundred bushels of corn, under the following circumstances: In November 1873, George W. Heritage was the owner of about five hundred bushels of corn, in bulk, and sold two hundred bushels of the same to William Hurff, who paid cash. By the verbal terms of the sale, the two hundred bushels of corn were to be retained by Heritage until they were in a condition to keep

well, and then to be by him delivered to Hurff. January 2d 1874, the sheriff, John Hires, under an execution against Heritage, issued out of the Circuit Court, levied upon the five hundred bushels of corn, which still remained, in bulk, in the actual possession of Heritage. Soon after the levy on the corn by the sheriff, Heritage delivered to Hurff two hundred bushels, according to their agreement, and the action was brought by the sheriff against Hurff to recover the value of this corn, after demand made of him and refusal to re-deliver the same.

Upon these facts, proven by the testimony of both Heritage and Hurff, the defendant's counsel requested the court to charge the jury that if Hurff and Heritage, at the time of the sale of the corn, intended and understood the sale to be complete, that then the property passed, at that time, to Hurff, and the plaintiff could not recover its value for his refusal to return it after it was separated and delivered to him by Heritage. The court refused so to charge and instructed the jury that notwithstanding Hurff bought and paid for two hundred bushels of Heritage's corn before there was any levy upon it by Sheriff Hires, yet as it appeared that it was in bulk with other corn, and not separated at the time of the sale, or prior to the levy by the sheriff, no property in the corn passed to Hurff, but remained in the defendant in execution, was bound by the levy of the sheriff subsequently made, and that the defendant was liable to the sheriff for the value of the corn delivered by Heritage to him after such levy.

The defendant's counsel excepted, and this writ of error was brought.

D. J. Pancoast, for the plaintiff in error.

H. L. Slape, for the defendant in error.

The opinion of the court was delivered by

SCUDDER, J.—The facts being admitted, the single question is presented, whether there was any evidence from which the jury might infer that the parties to the contract for the sale of the two hundred bushels of corn intended that the sale should be complete and executed, or whether, upon the admitted facts, the sale was incomplete and the contract merely executory.

This question is so important in its relation to the business of merchants and others in buying and selling the various commodities

which are the objects of trade, that it is not strange there should be many conflicts and nice distinctions found in the books in determining the rights of the parties.

It is desirable that the law affecting sales should be as fixed and well defined as the nature of the case will admit, that all may know it and deal securely with reference to such law. Yet there is scarcely a subject in the law which conflicting decisions have left in greater uncertainty.

The ordinary rule is, that the property in a chattel passes according to the intention of the parties. In determining such intention in a contract of sale, it is admitted that it is a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain, as matter of law, that the evidence will justify a finding but one way : *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291 ; *De Ridder v. McKnight*, 13 Johns. 294.

It was held by the court below that the evidence in this case will justify a finding but one way, and they so instructed the jury. Was this charge correct?

It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold by number, weight or measure, the sale is incomplete, and the risk continues in the seller until the specific property be separated and identified: 2 Kent's Com. 496.

It does not alter the principle that the payment for the goods has been made in whole or in part ; nor that they are unfit for delivery at the time of sale. To overcome the presumption that the sale is incomplete and executory, there must be some further act of the parties to express the intention that the title shall be complete and executed. There must be some delivery, or attempt at delivery, some separation, or attempt at separation, or some clearly-expressed purpose, to show that in the minds of the parties the sale was executed ; otherwise, under the rule above stated, the sale is incomplete.

A brief consideration of some of the cases will show that this principle is firmly established, and its admission will reconcile much of the apparent conflict between them. I know no better statement of it than that made by BAYLEY, J., in *Gillett v. Hill*, 2 C. & M. 530, in these words : " Where there is a bargain for a certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to

them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable until that is done. If I agree to deliver a certain quantity of oil, as ten tons out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided."

In *Scudder v. Worster*, 11 Cush. 573, two hundred and fifty barrels of pork were sold, part of a larger lot, all of the same quality, having the same marks, and all stored in the vendor's cellar, but no separation was made. The purchasers gave their negotiable promissory notes in payment of the barrels bought. It was held that as there had been no possession on the part of the purchaser, and no separation of the barrels from a larger mass of articles similar in kind, and no descriptive marks to designate them, that no title passed. Many cases are reviewed and distinguished in the opinion of the court.

Mr. Benjamin, in his Book on Sales (§ 354), says that the only case to be found in the reports in apparent contradiction to this principle of the law of sales is *Whitehouse v. Frost*, 12 East 614. He adds that this case, notwithstanding explanations by the judges who took part in the decision made in subsequent cases, is scarcely ever mentioned without suggestion of doubt or disapproval.

But that case differs from the one we are considering, in that the purchaser of the forty tons of oil, in bulk, sold to a third person and gave an order for delivery, which was accepted; while here it was expressly agreed there should be no delivery or separation until a future time. The oil was also in the custody of another, and not left in the possession of the seller, as in this case.

Whitehouse v. Frost has been followed by several cases in this country. *Kimberly v. Patchin*, 19 N. Y. 330, is one often cited. Here there was a sale of six thousand bushels of grain from a greater quantity. A written receipt was given for the six thousand bushels sold from a greater quantity in store, subject to the order of the purchaser free of all charges on board. There was a bill of sale and a writing that the seller held as bailee of the purchaser. The case was decided upon the principle that where the parties to a sale of goods so situated expressly declare an intention to change the title, there is no legal impossibility in the way of that design.

Foot v. Marsh, 51 N. Y. 288, states the distinction between that

case and *Kimberly v. Patchin*. There was an agreement for a sale to the plaintiffs of one hundred barrels of oil, by the sample then exhibited, for which the plaintiffs were to give their note at three months, and as the barrels contained different quantities, in order to ascertain the amount for which the note should be given, it was agreed that each barrel should contain an average of forty gallons, in all four thousand gallons, and that they should be subject to twenty shillings storage until called for. When the plaintiffs called for the oil the defendants delivered one hundred barrels, containing eighteen hundred and eighty-one gallons. The diminution was caused by leakage. In an action to recover the deficiency, it was held that the contract was executory, not executed, and the plaintiffs could recover the amount specified in the contract.

In *Russell v. Carrington*, 42 N. Y. 118, there was a sale of part of a cargo of grain stored in an elevator. *Cushing v. Breed*, 14 Allen 376, is a similar case. In both it was held that the order on the superintendent, or person in charge of the elevator, to hold and deliver the grain subject to the order of the purchaser, manifested an intent to pass the title, and rendered the transaction an executed contract, without actual separation or delivery of the property. The grain was not in the actual possession of the seller, but of his agent; the order upon the agent and acceptance by him was all the delivery that could conveniently be made, and the grain after the order was given and accepted, was not in the possession nor under the control of the seller, nor was there anything further for him to do. In the latter case, the distinction is well stated between that and the class of cases where the vendor himself retains the possession, because there is something more to be done by him, such as measuring, weighing or marking, as where an entire bulk is delivered to the vendee in order that he may make the separation himself. It was also said in this case, that a tenancy in common resulted from the method of storing in the elevator, which had been agreed upon by the parties, and superseded the necessity of measuring, weighing or separating the part sold. The peculiar position of grain in elevators, the mixed property of different owners stored in large quantities, the convenience and necessity of selling while in storage for future shipments and for advances, may require some modification by custom of the rule that has been applied to ordinary cases of sales of smaller quantities from the mass.

Chapman v. Shepard, 39 Conn. 413, goes to the extent that the rule of law, that upon the sale of a portion of a large bulk, the contract remains, in judgment of law, executory until the portion sold is severed and separated for the purchaser from the mass, is limited to cases where the articles differ from each other in quantity, quality or value, so that they must be selected to be distinguished, and does not apply to cases of sales of part of an ascertained mass of uniform quality and value. See also *Waldron v. Chase*, 37 Me. 414, which is qualified and distinguished in the latter case of *Morrison v. Dingley*, 63 Me. 553, where the simple fundamental rule applicable to sales of chattels not specific is clearly asserted.

In our state the general principle was incidentally referred to in *Thompson v. Conover*, 3 Vroom 466, and more directly in *Boswell v. Green*, 1 Dutcher 390. In the latter case there was a sale by debtors to a creditor of all their coal lying upon a wharf, by a bill of sale, an order for delivery accepted, and possession given by the wharfingers prior to a levy by the sheriff at the suit of other creditors. This sale was clearly completed within all the cases that have been cited. A like case is *Macomber v. Parker*, 13 Pick. 175.

The conclusion to which all the cases tend is, that where there is a contract for the sale of a certain quantity of goods, in general a smaller from a greater quantity in bulk, without a special identification of them or an appropriation of them to the contract, it is an executory agreement, and the property does not pass until such appropriation is made, unless there be a clearly-expressed intention to make the sale of the articles complete and absolute: *Campbell v. Mersey Docks*, 14 C. B. N. S. 412; *Aldridge v. Johnson*, 7 E. & B. 885; *Young v. Matthews*, L. R. 2 C. P. 127; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Riddle v. Varnum*, 20 Pick. 280; *Keeler v. Goodwin*, 111 Mass. 490; 1 Pars. on Cont., § 527; Story on Sales, § 352, &c.; Hilliard on Sales, 135-147; Benjamin on Sales, §§ 310, 334, 352, &c.; 2 Schouler's Pers. Prop. 244, &c.

In the present case, the two hundred bushels of corn were to remain in bulk, and an undistinguished part of the five hundred bushels, until they were hardened; then they were to be weighed or measured and delivered by the vendor to the vendee. There was no bill of sale, no receipt, no delivery, no statement as to whose should be the risk, no special appropriation, no fact but payment

to indicate a purpose to make an immediate and absolute sale of the corn. There were, therefore, no facts in the case from which a jury could legally infer that the contract was complete in law.

The judgment of the Circuit Court is affirmed.

If any one were to infer from the principal case that the point decided is free from doubt he would make a great mistake. Roughly speaking, the conditions necessary to a completed sale, *i. e.*, one which will pass the property in chattels from the vendor to the vendee, are that the subject of the sale is agreed upon and in existence; that the vendor has the right of property and is competent to transfer it, and finally that the intention of the parties that it shall be transferred is clear. The proposition thus stated is in practice further qualified, where the 17th section of the Statute of Frauds is in force by the requirement that the sale must be in writing or earnest must be given, or there must be a partial delivery and acceptance; and everywhere by the requirement that it must not be in fraud of the vendor's creditors; and finally, if delivery has not been actually made to the vendee, the sale is subject to the vendor's right, in case the vendee becomes insolvent before payment, to retain the goods or stop them in transitu for the price. But these rules, although they have often been decisive of the ownership of goods, have nothing to do with the question, whether title has passed, because they operate upon the validity of the contract irrespective of title at all, being rules of public policy extinguishing titles in certain cases whether actually made out or not. We call attention to this difference at the outset because the observance of it relieves the cases of much perplexity: *Winslow v. Leonard*, 12 Harris (Pa.) 14.

It may be said generally that the cases upon the passage of property in chattels have arisen either where the subject of sale has been destroyed or where the buyer or seller has become insolvent

before payment or before delivery. The question whether the property has passed being one of intention, has been most difficult to solve in the class first mentioned, because both parties to the contract being solvent and equally meritorious are eager to escape loss, but when one of the parties is insolvent and the dispute is whether he shall pay the other in full or only a dividend the real intention is easier arrived at. The question whether the parties intended that the property should pass like any other fact is for the jury: *De Ridder v. McKnight*, 13 Johns. 294; *Bank v. Bangs*, 102 Mass. 294; unless the facts are such that no intention to do so could be inferred from them when the court would be justified in instructing the jury, as was done in the principal case, to find a verdict upon the law.

The cases in which it has been held that the property *cannot* have been intended to pass, are divided into two classes:—

1. Where something remains to be done by the vendor, as to make, alter, or complete the subject of sale; because, until it has been put in the condition agreed upon it is not the thing sold, and therefore the buyer has no property in it; the sale is not complete.

2. Where the subject of sale is part of a larger quantity, as one hundred out of five hundred head of cattle; because, until it has been separated and specified, there is nothing to show what part has been sold.

Both these classes of contracts are construed to be agreements to deliver articles of a certain description which would be complied with by any answering the description. This note is devoted to the consideration of cases of the second class.

In *White, Assignee, v. Wilks*, 5 Taunt. 176 (1813), the bankrupt bought twenty tons of oil from the defendant, to be paid for in four days by his acceptance, and to be delivered in one month. A bill was presented, but before acceptance the purchaser failed. In this action of trover by the assignee, it appeared that the defendant had several cisterns of oil and the bankrupt did not know out of which his was to come. The court held there had been no complete sale of property and no particular oil had passed to the bankrupt, and therefore his assignee could not maintain trover.

Hutchinson v. Hunter, 7 Barr 140 (1847). Hunter bought one hundred barrels of molasses from one Poindexter, who had two hundred and fifty stored in his cellar, of different quantities and values. It was agreed to settle on a gauge of forty gallons to the barrel—the true amount to be determined afterwards—and a note was given for the price. Hunter sold the one hundred barrels he had in Poindexter's cellar to Hutchinson, at thirty-two cents a gallon cash, and offered to turn them out and gauge them. Before the money was paid the molasses was destroyed, and this action of assumpsit was brought to recover the price. ROGERS, J., held that no property had passed, and concludes, "It will be observed that the case is put entirely on the fact that the barrels were of unequal quantities and values and had not been separated from the molasses still owned by the vendor. That the molasses was not gauged does not enter into the consideration of the court in determining the defendant's liability to the action. In *Woods v. McGee*, 7 Ohio 467 (1836), which is emphatic in making severance a condition precedent to property in any part, it is to be observed that the one thousand five hundred barrels of flour, for three hundred of which trover was brought, differed in value from twenty-five cents to fifty cents per barrel. *Foot v. Marsh*, 51 N. Y. 288 (1873), the defendant

bought and paid for one hundred barrels of oil, to contain four thousand gallons like sample, out of one hundred and fifty of three different qualities. When delivered there had been a great leakage, and this action was brought to recover damages for it. The court sustained the action on the ground that the agreement was to deliver four thousand gallons of oil, and gave as one of the reasons why property had not passed to the purchaser in any part, that the whole was composed of various qualities.

Where there is any difference between the articles composing the whole of which a part is sold, it is quite clear that there remains a right of selection which would prevent property passing in any particular thing to the vendee. In such a case there is nothing for a jury to pass on, because intention to make a completed sale could not be inferred. In this way many decisions like those just quoted could be disposed of on grounds satisfactory to every one, in which the courts have used language more sweeping than the facts required, viz., that severance is necessary in all cases to pass the property in a part of a larger quantity.

In one case the court carried the power of the parties to pass property, if they intended to do so, so far as to allow the purchaser of one hundred head of cattle out of a herd of four thousand to maintain trover for them: *Watts v. Hendry*, 13 Fla. 526 (1871); the defendant, who was the purchaser of a herd of cattle out of which the plaintiff had already bought one hundred two year old steers, notified him to select and drive them away by a given day or he would not recognise his right to do so. The plaintiff not having done it within the time set, brought this action of trover, which the court sustained, because the defendant had admitted his property in any one hundred cattle of the description named which he might select.

But where there is absolutely no difference between the parts composing the

whole, as in the case of money, oil, wine, grain, coal, &c., the importance of selection disappears, and the violence of the legal presumption that the parties could not have intended a transfer of the property is proportionately weakened. Of this class was the noted case of *Whitehouse, Assignee, v. Frost*, 12 East 614 (1810). The bankrupt was the sub-vendee of ten tons of oil, part of forty tons contained in the same cistern. He had received from his vendor an order upon the original owners in whose custody it remained to deliver the oil to him, which they had accepted. Before payment he failed, and this action of trover was brought by his assignee against his vendor and the custodian of the oil. LE BLANC, J., said, "But something, it is said, still remained to be done, namely, the measuring off of the ten tons from the rest of the oil. Nothing, however, remained to be done to complete the sale. The objection only applies where something remains to be done, as between the buyer and seller, or for the purpose of ascertaining either the quantity or the price, neither of which remained to be done in this case, for it was admitted by the persons who were to make the delivery to Townsend that the quantity mentioned in the order was in the cistern in their custody, for they had before sold that quantity to the Frosts, of whom Townsend purchased it, and had received the price. Therefore, though something remained to be done as between the vendee and the persons who retained the custody of the oil, before the vendee could be put into separate possession of the part sold, yet as between him and his vendors nothing remained to perfect the sale."

Jackson v. Anderson, 4 Taunt. 25 (1811), was a case of trover for 1969 Spanish dollars, belonging to the plaintiff out of a barrel containing \$4718, consigned to one Laycock, who had used the proceeds as a credit in their account with the defendants, their bankers.

MANSFIELD, C. J., said: "It appears that no separation was ever made from the whole quantity of \$1969 belonging to the plaintiff. And an objection has been taken on that ground against the form of the action. But we think there is no difficulty in that point. The defendant has disposed of all the dollars; consequently he has disposed of those which belong to the plaintiffs, and as all are of the same value it cannot be a question which particular dollars are his."

In *Kimberly v. Patchin*, 19 N. Y. 330 (1859), the owner of a large quantity of wheat sold six thousand bushels of it to A., who left it in his possession and received a warehouse receipt. A. sold the bill of sale and warehouse receipt to the defendant. Subsequently, the owner sold the whole pile to the plaintiff, and the defendant replevied six thousand bushels. It was held that there being no legal impossibility in two persons being tenants in common of a quantity of wheat, the bill of sale and warehouse receipt showed that it was the intention of the parties to create this relation or something like it, and the owner became a bailee for A. or his assigns of six thousand bushels, out of the whole quantity, in which the plaintiff had property and could maintain replevin. Also, *Russell v. Carrington*, 42 N. Y. 118 (1870).

For an excellent statement of the position that severance is not necessary to an executed sale of a part of a uniform whole if the parties intended to pass the property, see *Chapman v. Shepard*, 39 Conn. 413 (1872); *Waldron v. Chase*, 37 Me. 414 (1854); *Pleasants v. Pendleton*, 6 Rand. 475.

As we have seen that many cases, in which much was said about the want of severance and appropriation, might have rested on the fact of the difference between the articles composing the whole in quantity, quality or value, so there are many such which might as easily

and more satisfactorily have been rested upon the right of the vendor to retain for the price, the vendee being insolvent or on the fact that there remained something for the vendor to do before the things sold could be considered to be in a deliverable state.

Wallace, Assignee, v. Breeds, 13 East 522 (1811). Trover for fifty tons of oil *ex* ninety and order for delivery accepted by wharfinger. Before delivery the purchaser failed and the seller countermanded the order to deliver which had been accepted by the wharfinger. Besides, it appeared to be the constant custom before Greenland oil is delivered "to have the casks searched by a cooper employed by the seller, and it is also the custom for a broker on behalf both of the buyer and seller to attend to make a minute of the foot-dirt and water in each cask, and the casks are then filled up by the seller's cooper at the seller's expense, and delivered in a complete state, containing the quantity sold, none of which circumstances had taken place at the time of the countermand."

Bush v. Davis, 2 Maule & Sel. 398 (1814), was trover for ten tons of flax, part of eighteen owned by the plaintiffs and in the possession of the defendant as wharfinger. The plaintiff sold the ten tons to one Bromer, and gave him a delivery order, which was accepted by the defendant. Before actual delivery Bromer failed and the plaintiffs countermanded the order. The flax was in mats, and in order to deliver ten tons it might be necessary to break a mat, and it would be certainly necessary to calculate the tare upon the weight of the mats and ropes, and the draft upon the number of the mats. *Held*, no property passed, because something remained for the vendor to do before the flax would be in a deliverable state.

Shipley v. Davis, 5 Taunt. 617 (1814), was a case in the Common Pleas, raising exactly the same point as *Bush v.*

Davis, supra, did in the Queen's Bench, and was similarly decided.

Aldridge v. Johnson, 7 El. & Bl. 885 (1857). The plaintiff bought and partly paid for one hundred quarts of barley out of two hundred quarts owned by one K., and was to send his own sacks for it, which K. was to fill and deliver. After K. had filled some sacks he emptied them back, and then becoming bankrupt, the defendant, his assignee, removed the whole quantity. This was trover by the plaintiff for one hundred quarts. *Held*, that property had passed to the plaintiff in the barley which had been put in his sacks, but not in the balance. *Langton v. Higgins*, 4 H. & N. 402, raised precisely the same point as to the sale of a crop of peppermint oil, and was decided in the same way: *Keeler v. Goodwin*, 111 Mass. 490 (1873).

Even though the view that severance is not a legal necessity be adopted, yet it remains to inquire whether the parties really did intend that the property should pass. It was held that they did not intend to do so in *Golder v. Ogden*, 3 Harris (Pa.) 530 (1850). GIBSON, C. J., construed the contract for two thousand pieces of wall paper, the seller of which having been paid in full made an assignment after he had delivered one thousand, to be a contract to furnish two thousand pieces of a certain description, and none at all having been pointed out specifically or in gross any pieces would have fulfilled it.

Haldeman v. Duncan, 1 P. F. Smith 66 (1865). Duncan bought and paid for three hundred barrels of oil from Haldeman. The following was the bill of sale:—

"Messrs. Duncan & Williams,

Bought of William Haldeman three hundred barrels of crude oil in good new barrels, and in good condition. Said oil to be clear from water and slush, and to be about 44° gravity.

Said oil to be delivered at Oil City, ready for shipment on first water, at \$12.87½ per barrel, \$3862.50."

At the time of the sale, Haldeman pointed out to Duncan a larger quantity of oil and told him to select his barrels. Duncan tested some of them and declared himself satisfied, but went away without selecting or separating the amount he had purchased. All this oil was destroyed before the actual delivery of any to Duncan, but Haldeman contended that the property in three hundred barrels of the larger lot had passed to him. READ, J., thought that the evidence showed no selection or intention to select and that there was therefore no delivery.

Morrison v. Dingley, 63 Me. 553 (1874). The court regarded the facts that there had been no payment by the vendees and no bill of sale, accepted delivery, order or warehouse receipt on the part of the vendors, as proving that they could not have intended to give up the property. They expressly disclaimed any intention of qualifying the doctrine of the earlier case of *Waldron v. Chase*, *supra*.

A good deal of inconclusive reasoning upon this subject has passed current in high quarters. It has been thought that if the part sold is in the possession of a third party and not of the seller that a sale may be made without severance, because the third party becomes the bailee of the sub-vendee. But bailee of what? Of nothing more exact, specific or defined, more capable of sale, than before the second transaction was made. Again, courts have been very much influenced by the circumstance that the seller or his bailee has accepted an order for delivery or has given a warehouse receipt. But the question recurs, of what? Of nothing in the least more exact or defined because of that fact. These circumstances do have weight as showing the intention of the parties to make a completed sale, but

then this confirms the doctrine that the parties may do so without severance if their intention is clear, and not the opposite doctrine they are relied on to support. Both these positions are mentioned with approval in the principal case.

In *Gillett v. Hill*, 2 Cr. & Mee. 530 (1834), the plaintiff had received from O. an order upon the defendant, a wharfinger, to deliver him twenty sacks of flour. The defendant accepted it and delivered five sacks. This was an action of trover for the remaining fifteen. It appeared that the defendant had in his possession a much larger number of O.'s sacks, and that there had been no severance or selection for the order held by the plaintiff. But the court were of opinion that property had passed to him and he could maintain trover because the acceptance did not show the twenty sacks to be a part of a larger number. The answer to this is that if severance be necessary to a sale he had no property and could, therefore, not maintain trover. Of course he would have a remedy against the wharfinger in damages for not complying with his acceptance, as was held in *Austin v. Craven*, 4 Taunt. 644, in which one Kruse had bought and the defendant agreed to deliver fifty hundred-weight of sugar known as double loaves, not pointed out or even in existence. Kruse sold to the plaintiff and gave him an order on the defendant to deliver, which was accepted. Kruse was then paid by the plaintiff, but before paying the defendant became insolvent and the defendant refused to deliver to the plaintiff, who brought an action of trover, which the court held could not be maintained because it required property in some particular sugar, whereas the sugar sold was not in existence.

So in *Whitehouse v. Frost*, *supra*, the court gave weight to the fact that the plaintiff was a sub-vendee, and that everything had been done between him

and his vendor that could be done, intimating that if his vendor had been plaintiff against the custodian of the oil the case would have been different. But how could the vendor give the subvendee any better title than he had himself, and if severance were necessary to title between him and the custodian, why not between him and his subvendee?

In *Russell v. Carrington*, *supra*, the court thought the circumstance that the grain was in the elevator of a third party greatly relieved the question of embarrassment about severance. How this could make the plaintiff's title any better, so far as the question of severance is concerned, it is not easy to see.

Crofoot v. Bennett, 2 Comst. 258 (1849). Trespass for taking bricks September 2d. One Horace Crofoot transferred all the bricks in a new kiln to the defendant, out of which he was to take forty-three thousand. On October 6th he gave a bill of sale to his brother, Sylvester Crofoot, for all the bricks in the new kiln. Subsequently, the defendant opened the new kiln and took away forty-three thousand bricks. *Held*, that property had passed to the defendant in the forty-three thousand, because delivery of all had been made to him from which to select, otherwise, no separation having been made, property would not have passed. But if property would not have passed by a sale of the forty-three thousand for want of severance, the defect could not be cured by a symbolical delivery of the whole kiln, because that was for the purpose of severance of part, which had not taken place when the sale was made to Sylvester Crofoot of the whole.

The Massachusetts decisions are irreconcilable. In *Gardner v. Dutch*, 9 Mass. 427 (1812), Gardner, the plaintiff, master of a trading ship, brought home a cargo of coffee to the owners, Wellman & Ropes. He was entitled to seventy-six bags as his share of the ad-

venture, for which they gave him a receipt on receiving the cargo. The defendant, a deputy sheriff, had levied upon the whole quantity, and the plaintiff brought this action of replevin for his seventy-six bags. It was objected that at best the plaintiff was but tenant in common with Wellman & Ropes, and could not, therefore, maintain replevin, but the court briefly said, that as he could have selected any seventy-six bags in the hands of Wellman & Ropes, he could do so when in the hands of the sheriff.

Scudder v. Worster, 11 Cush. 579 (1853), was an action of replevin for one hundred and fifty barrels of pork by the subvendee, who presented a delivery order for it from his vendor to the defendant, which was accepted, but his vendor having in the meantime failed, the defendant refused to deliver, on the ground that he had not been paid. The court held the action could not be maintained, because there had been no specific appropriation.

It would be very hard to reconcile this case with *Gardner v. Dutch*, or with *Cushing et al. v. Breed et al.*, 14 Allen 376 (1867), which was an action to recover the price of five hundred bushels of corn sold and delivered.—The plaintiff, being the owner of a cargo of grain, stored in an elevator belonging to third parties, sold five hundred bushels to defendant, and gave them an order in the following terms: "Please deliver Breed & Co., or order, five hundred bushels black oats, from cargo per schooner Seven Brothers, storage commencing to the person or persons in whose favor this order is drawn, June 29th 1864," which was accepted by the elevator. After delivery of one hundred and five bushels the rest was burned. *Held*, property in the corn had passed, because the contract changed the relation of the elevator from agent of the vendor to agent of the vendee, and the possession of the agent being

that of the principal, the corn was delivered. It was distinguished from the class of cases where the vendor retains possession, because there is something further for him to do. But the bailee was after the second transaction as before, bailee of an unascertained part of the whole, and if severance were necessary to the passing of property it had not gone into the defendant.

In regard to these distinctions it is difficult to see why, if the plaintiff when in possession of the cargo could not have given title to a part of it for *want of severance* he could do so any better when his agent was in possession. It will be remembered that in *Scudder v. Worster*, the person who sold to the sub-vendee was not in possession, and accordingly the acceptance of the delivery order by the person in possession ought to have passed the title to the sub-vendee.

The judicial progress takes another turn in *Weld v. Cutler*, 2 Gray 196 (1854), which was an action against Cutler, assignee of A., for the conversion of two hundred tons of coal. The plaintiff had been put in possession as mortgagee of a pile of coal containing five hundred tons to sell two hundred. Before any severance, A. became insolvent and his assignee sold the coal. The court distinguished the case from *Scudder v. Worster* by saying, as was said in *Crofoot v. Bennett*, *supra*, that the delivery of the whole pile passed the property. But the delivery was to sell two hundred tons and there having been no severance or identification, how, consistently with former rulings, could property have passed? It may not be easy to reconcile the Massachusetts cases with each other or with the principle which they profess to maintain that severance is necessary to pass property, but the practical result of them keeps pace with modern wants and manners. Even there the rule of *Scudder v. Worster* is not applied to the ele-

vators and warehouses which are playing so important a part in modern commerce. It could not be maintained without great injury to merchants that a bill of sale and elevator receipt does not give title to the grain called for. See also on this subject 1 Pars. on Cont., sec. 527; Addison on Contracts, p. 453; Blackburn on the Contract of Sale *122; Benjamin on Sales, sects. 334 and 352; Parsons on Mercantile Law, p. 48.

Examined in the light of what has been said, the principal case is not a satisfactory one. In a few brief words it intimates that "a clearly-expressed intention to make the sale of the articles complete and absolute" might pass the property in a part of a greater quantity without special identification or appropriation. Yet the judgment amounts in the whole swing and conclusion of it to an emphatic declaration of the principle that such severance is a legal necessity. At the trial the defendant's counsel requested the court to charge "that if Hurff & Heritage, at the time of the sale of the corn, intended and understood the sale to be complete, that then the property passed at that time to Hurff and the plaintiff could not recover its value for his refusal to return it after it was separated and delivered to him by Heritage," which the court refused to do and this ruling is sustained. If intention to make a completed sale could have done it this was one. The vendor and vendee concurred in testifying to a sale in every way complete. Importance should not have been given to the circumstance that the wheat was to remain in the hands of the vendor until it should harden, because that was a privilege of the vendee entirely consistent with his right to immediate possession. That there must be weighing and measuring before delivery will not prevent property passing in an article unless it is necessary to *identification*: *Riddle v. Varnum*, 20 Pick. 283; *Turley v. Bates*, 2 Hurlst. & C. 200; *Mar-*

tineau v. Kitching, L. R. 7 Q. B. 436 ; was absolutely immaterial, because
Scott v. Wells, 6 W. & S. 362. they would only be evidence to prove
 absence of a bill of sale, accepted what was admitted.
 delivery order or warehouse receipt

H. G. W.

Court of Appeals of Kentucky.

PERRY v. WHEELER ET AL.

Civil courts cannot re-judge the judgment of an ecclesiastical tribunal in matters within the latter's jurisdiction ; but the decision of such tribunal upon its own jurisdiction over the subject-matter is not exclusive. The control of the civil courts over the civil rights of the citizens cannot be ousted.

A board of reference under canon 4 of the Protestant Episcopal Church is an ecclesiastical court, and the civil courts may inquire into its organization and decide whether it has acted within the scope of its constitutional authority.

The word "permanently," as used in the call of a rector, means indefinitely, and constitutes a contract that he should continue to hold the office of rector till one or the other of the parties desires to terminate the relation, and then to be terminated after reasonable notice and with the approval of the ecclesiastical authority of the diocese.

Certain canons of the Episcopal Church construed.

The decisions of the state courts upon the rights of parties under state laws are final and binding upon the federal courts, and a decision of the latter, which is in opposition to the construction of state laws given by the highest court of the state, will not be regarded by the state courts.

Watson v. Jones, 13 Wall. 679, reviewed and dissented from.

THIS was an action by Perry to recover salary alleged to be due him by defendants. The facts were substantially as follows: On September 1st 1866 the wardens and vestry of Grace Church at Hopkinsville, Ky., addressed a letter to plaintiff in the following words:—

"Dear Sir: By the unanimous vote of the members of Grace Church, Hopkinsville, taken at a meeting held on Thursday last, the vestry were authorized to submit the following to your consideration:—

"Be it resolved, and hereby it is resolved, that the Rev. G. B. Perry, D. D., be, and hereby is, elected *permanently* to the rectorship of Grace Church, Hopkinsville, at a salary of ——— dollars per annum, to be paid quarterly, each quarter respectively *in advance, with the free use also of rectory grounds*, as soon as vacated by present occupant.

"Resolved, that said blank in regard to salary be hereafter filled."